Todd F. Silbergeld
Director
Federal Regulatory

SBC Communications Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
Phone 202 326-8888
Fax 202 408-4806

August 15, 1997

NOTICE OF EX PARTE PRESENTATION

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *In the Matter of Petition of MCI for Declaratory Ruling, File No. CCBPol 97-4; CC Docket No. 96-98*

Dear Mr. Caton:

In accordance with the Commission's rules governing ex parte presentations, please be advised that yesterday, M.E. Garber, Senior Counsel, SBC Communications Inc., Harlie D. Frost, Attorney, Southwestern Bell Telephone Company, John I. Stewart, Jr. of Crowell & Moring LLP, and the undersigned, met with Craig Brown, Robert Tanner, and Vaikunth Gupta of the Common Carrier Bureau's Policy and Program Planning Division in connection with the above-referenced matter.

The purpose of the meeting was to discuss SBC's position regarding the various issues raised by the pending petition for declaratory ruling.

Should you have any questions concerning the foregoing, do not hesitate to contact me. In accordance with the Commission's rules, an original and one copy of this notification are submitted herewith.

Very truly yours,

Todd F. Silbergeld

Attachment

cc: Mr. C. Brown
Mr. R. Tanner
Mr. V. Gupta

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List ABCDE

M E M O R A N D U M

AUTHORITY OF FEDERAL COMMUNICATIONS COMMISSION TO ORDER ILEC ACQUISITION OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS ON BEHALF OF COMPETING LECS

The recent decision of the U.S. Court of Appeals for the Eighth Circuit in Iowa Utilities Board v. FCC provides new support for our view that the Commission should not and cannot order incumbent LECs to acquire additional intellectual property rights from third parties in order to provide them to competing LECs whose use of the ILECs' network facilities would otherwise violate license restrictions or infringe the third parties' rights.

In general, the decision severely limits the Commission's authority to issue orders affecting the local exchange market. It rejects numerous Commission arguments that the Communications Act and specific provisions of the 1996 Act grant it jurisdiction to "intrud[e] on the states' intrastate turf."

It holds that the exclusive means for reviewing state commission determinations under the Act is federal district court review under section 252(e)(6). Thus, in cases such as Texas, where the state PUC has already determined the process by which third party intellectual property rights will be protected in the course of providing unbundled network elements pursuant to an access and interconnection agreement, the FCC has no jurisdiction to impose a different rule.

The decision expressly does not reach the question presented here, since the record was not sufficiently developed in Docket No. 96-98 to demonstrate the immediate threat to third party intellectual property rights. In declining to address the issue, however, the court gratuitously notes that section 251(d)(2) contemplates that CLECs will have access to proprietary elements. (n.37) But section 251(d)(2) does not (and could not) grant jurisdiction to the Commission to affect intellectual property rights of unregulated third parties that are expressly protected under other state and federal laws. Indeed, section 251(d)(2) explicitly limits the Commission's consideration of proprietary rights issues to "determining what network elements should be made available" under section 251(c)(3), which the Commission did in its First Report and Order. Having done so, the FCC

has no further authority to prescribe the particular method by which that access is to be provided, when its method would affect independent intellectual property rights of third parties and override the decision of state PUCs exercising their exclusive authority under the Act to arbitrate, implement, and enforce access and interconnection agreements.

The decision makes clear that section 251(c)(3) mandates unbundled access "only to an incumbent LEC's existing network -- not to a yet unbuilt superior one." Thus, if a CLEC prefers enhanced or different facilities in addition to the incumbent LEC's existing network, it must build or acquire them itself. By the same analysis, the statute cannot be read as mandating an incumbent LEC to acquire additional intellectual property rights or licenses for the competing LEC.

In this same context, the decision expressly rejects the argument that the statutory requirement that access be nondiscriminatory requires incumbent LECs to acquire enhanced network capabilities at the request of competing LECs. As the court holds, section 251(c)(3) (cited by MCI and others as the basis for the relief requested in this proceeding) "merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier." The court also expressly rejects the argument (again identical to one raised here) that the fact that an incumbent LEC could be compensated by a CLEC for acquiring such additional capabilities mandates the incumbent LEC to do so under the nondiscriminatory access provision of section 251(c)(3).

In sum, the decision provides powerful additional reasons for the Commission to refrain from ordering the relief MCI and others request. As SBC has previously explained, intellectual property licensing should be determined through marketplace negotiations between the real parties in interest, not made subject to an unworkable Commission regulatory regime. The hands-off approach dictated by intellectual property law principles is further bolstered by the Eighth Circuit's determination that the FCC may not exercise jurisdiction that impinges upon state PUC implementation of local exchange access and interconnection agreements.

ALCATEL

March 14, 1997

Larry Exler
Contract Manager
Southwestern Bell Telephone
1010 Market St. Room 700
St. Louis, Missouri 63101

Dear Mr. Exler:

I received your letter dated February 14, 1997 relating to certain provisions of the Telecommunications Act of 1996 and certain Texas PUC decisions. I appreciate you providing this information to Alcatel.

Alcatel agrees that any provider that accesses Southwestern Bell Telephone's network elements (which include products that Southwestern Bell Telephone obtained from Alcatel) must obtain appropriate licenses directly from Alcatel. Therefore, we would encourage you to have competing carriers contact us directly to begin appropriate licensing negotiations. We understand and agree that any resulting license would be licensed from us to the competing carrier rather than a modification of the existing agreement with Southwestern Bell Telephone.

If you have any questions regarding this letter, please do not hesitate to give me a call at 972 996-2757.

Sincerely yours,

Douglas P. Sims
Manager, Contracts

cc: Bill Fuerst, Regional Vice-President

Maryellen Mailyon

NEWBRIDGE
Legal Department

March 26, 1997

Mr. Larry Exler
Contract Manager
Southwestern Bell Telephone Company
1010 Pine Street
Ninth Floor
St. Louis, MO 63101

Dear Mr. Exler:

Thank you for your letter of February 14, 1997, regarding the impact of the Telecommunications Act of 1996 (the "Act") on telecommunications equipment suppliers such as Newbridge Networks, Inc. ("Newbridge").

While it is not subject to regulation by the Federal Communications Commission ("Commission"), Newbridge monitors regulations issued by the Commission that affect its operations as a supplier of network equipment to the regulated carrier market. Newbridge has, and will continue, to take all appropriate measures to ensure that it provides the necessary technical information required to be disclosed by a regulated carrier to a requesting carrier for interconnection purposes. Newbridge is, however, strongly committed to safeguarding its proprietary technical information, and to ensuring that all uses of its proprietary network software and systems are authorized by the company through a license, non-disclosure or right-to-use agreement.

In response to your request for identification of all Newbridge-supplied network elements resident in Southwestern Bell Telephone's ("SWBT") network which are considered proprietary, third party access to, or use of, Newbridge's proprietary network management software ("NMS") (or to any other proprietary information released to SWBT by Newbridge through a non-disclosure or right-to-use agreement), is prohibited unless specifically authorized by Newbridge. We support the process outlined in your letter, whereby SWBT would refer to Newbridge all third parties requesting access to Newbridge's NMS (or other proprietary documentation) so that a right-to-use or license agreement can be negotiated.

Such a process is consistent with the Commission's Interconnection Order. To implement Section 251 (c) (3) of the Act, the Commission determined in its Interconnection Order that LEC's must make available all network elements for which it is "technically feasible" to provide access on an unbundled basis.[1] Access to proprietary network elements could be required under Section 251 (d) (2) (a) of the Act, if the Commission and the states determine that such access is "necessary" for competitive reasons. Under the proposed process, Newbridge would not preclude access to any of its proprietary network elements deemed "necessary" by the Commission in order to promote competition. It merely would require that a license or right-to-use agreement between the requesting carrier and Newbridge be negotiated prior to such use.

Further, in establishing minimum network disclosure requirements necessary under Section 251 (c) (5) of the Act, the Commission stated that it did not "anticipate that the level of information required by a competing service provider either to transmit and route services, or to maintain interoperability will, in the ordinary case, include proprietary information".[2] In the event that an interconnecting carrier or information services provider requires genuinely proprietary information belonging to a third party in order to maintain interconnection or interoperation with the incumbent LEC's network, the incumbent LEC is permitted to refer the competing service provider to the owner of the information to negotiate directly for its release. Access to Newbridge's NMS (or other proprietary documentation) would involve access to such "genuinely proprietary information", thus a competitive carrier's request to SWBT for access would require a prior agreement between the requesting carrier and Newbridge.

This interpretation also is supported by the Texas PUC ruling noted in your letter, which requires the requesting carrier to obtain the necessary license or right-to-use agreement from the vendor before it can access or use a proprietary network element. AT&T's appeal of this PUC ruling is of concern to Newbridge, and we are considering a further appropriate response.

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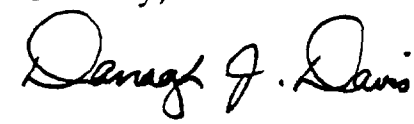
[1] See, First Report and Order, Implementation of the Local Competitive Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (August 8, 1996), para. 278.

[2] See, Second Report and Order and Memorandum, Opinion and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (August 8, 1996).

We are currently compiling a list of the network equipment which is responsive to your request and will forward it to you when it is completed. If you have any further questions regarding Newbridge's position on these issues please call me at (703) 736-5316.

Sincerely,



Darragh J. Davis
Vice President and
Chief Legal Counsel

General DataComm, Inc.

1579 STRAITS TURNPIKE, P.O. BOX 1299, MIDDLEBURY, CT 06762-1299 (203) 574-1118

February 25, 1997

Ms. Christine Beggs
Contract Manager
Southwestern Bell Telephone Company
1010 Pine Street, Cubicle 9E9
St. Louis, MO 63101

Dear Ms. Beggs:

I am responding to your letter of February 14, 1997 to the General DataComm Director of the Southwest Region. You notified General DataComm of the findings of the State of Texas Public Utilities Commission requiring Local Service Providers to obtain from SWBT suppliers, a license or right to use agreement with respect to intellectual property rights associated with any network element provided by such supplier to SWBT, if such rights would be violated when the LSP purchases network elements from SWBT as part of its interconnection with SWBT. You also requested General DataComm to provide SWBT with notice of General DataComm intellectual property rights associated with network elements that would be violated by a third party's use, and this letter provides such notice.

Section 4 of Amendment No.3 to Contract No. C1095F1 between SWBT and General DataComm adds, among other items, a new Section 57(1)(a) which provides for the license to SWBT of software. The license grant is nontransferable, provides no right of sublicense and its field of use is restricted to SWBT internal use. Therefore, use of such software by any third party or use by SWBT not in conformance with the terms above would require additional licensing terms from General DataComm.

I may be contacted at 203-574-1118, extension 6126 if there are any questions with respect to this matter.

Sincerely,

Bruce L. Galaro
Assistant Vice President
Corporate Alliances Counsel

cc: Arthur Lounder
Robert Suski

cc: Shawn Kenderic

VIDEOSERVER

March 5, 1997

Ms. Patricia Alberts
Contract Manager
Southwestern Bell Telephone
1010 Pine Street 9-E-81
St. Louis, MO 63101

Dear Ms. Alberts:

With regard to your letter dated February 14, 1997, Southwestern Bell Telephone has purchased from VideoServer multimedia conferencing servers. Should any competitive carrier(s) desire to use such server, they would require a software license from VideoServer.

If you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

Paul L. Criswell
Corporate Counsel

PLC:lma

cc: Sharon Kadari